

## The Legislation of Labour Relations in Canada Post

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### Résumé de l'article

L'accroissement du recours aux lois spéciales de retour au travail exige de revoir la théorie traditionnelle des relations professionnelles. Les conséquences de cette forme de législation signifient que la loi joue un rôle de plus en plus considérable dans le façonnement des relations entre le travail et le capital. Cet article aborde cette question à la lumière de la *Loi sur le maintien des services postaux* de 1987 qui marque une orientation nouvelle et majeure dans l'utilisation de telles lois. Le gouvernement met l'accent sur les relations professionnelles dans le secteur public à cause de leur grande valeur symbolique, mais aussi parce qu'elles constituent un aspect nécessaire et intégré dans sa politique économique. Cette stratégie agressive exige que l'on reconsidère le rôle de l'État tel que conceptualisé dans la théorie conventionnelle des relations du travail. De plus, lorsque les travailleurs s'opposent à ces changements, on assimile leur attitude à la recherche d'intérêts économiques sectoriels plutôt qu'à un élément d'un mouvement plus large à cause du régime juridique qui modèle ce milieu. La législation en matière de relations professionnelles, par conséquent, cache et révèle à la fois les rapports économiques de facture capitaliste.

Si l'on examine le contexte du différend de 1987 entre Postes-Canada et le Syndicat des postiers du Canada, les motifs allégués pour justifier la loi ordonnant le retour au travail apparaissent plus nettement. Elle contient des modalités d'application qui sont en même temps nouvelles et très répressives pour les syndicats et leurs membres. Cette loi requiert un examen approfondi du fait même de sa portée, car elle exprime un empiétement dans les affaires internes d'une organisation choisie démocratiquement qui a exercé son droit de grève d'une manière tout à fait légale. La réponse du syndicat à cette loi fut d'abord de s'y conformer, puis ensuite de la contester devant les tribunaux. Ses procureurs projettent de plaider qu'elle viole plusieurs articles de la *Charte canadienne des droits et libertés* et qu'elle devrait être déclarée inconstitutionnelle. L'article décrit les difficultés de cette démarche en référant au rôle de la législation dans les relations professionnelles. De plus, il tient compte de l'effet nocif que pareille action aura sur les membres du syndicat et sur le mouvement syndical dans son ensemble.

L'inopportunité de démarches juridiques devient claire lorsque l'on considère l'orientation politique du gouvernement et de la situation spécifique des services postaux à l'intérieur de celle-ci. Les syndicats ne doivent pas s'en remettre à la Charte pour combattre les lois spéciales de retour au travail, ceci n'a pour résultat que de faire passer la question des relations du travail des arènes politiques aux cours de justice. Au contraire, il s'impose que le mouvement syndical recentre son attention sur les mécanismes politiques.

# *The Legalisation of Labour Relations at Canada Post*

Michael D. Wright

*This paper situates the events surrounding the passing of the Postal Services Continuation Act in a social, political and historical context. The significance of the back-to-work legislation is discussed and the problems it presents for laborer are analyzed.*

In recent years the phenomenon of back-to-work legislation has become commonplace in Canadian labour relations. It has been argued that the state's use of such laws represents a fundamental change to the previously accepted principles of «free» collective bargaining, the result being a state of «permanent exceptionalism»<sup>1</sup>. The same state which in the past permitted and encouraged the formation of collective bargaining units, which saw its role primarily as a facilitator rather than an intervenor, and which voiced its commitment to labour as a partner to capital, has resorted to a barely mitigated attack on the working class in an attempt to sustain its economic policies. As Panitch and Swartz show, the attack on trade unionism has met with success in Canada, despite the fact that «there still exists an array of structures which reflect public recognition of the importance of working class legitimacy, organization, and needs, that is, while there remains, to this day, a residual adherence to something of a social welfare state and the legitimacy of trade unionism»<sup>2</sup>.

The law has not prevented the state from attaining its objectives; rather, it has been called on to play a legitimating role. The effect of this strategy has been that members of the legal profession «have come to play a disproportionate role in the administration, application, and the description of the scope and understanding of the major industrial relations institutes»<sup>3</sup>. The enactment of the *Postal Services Continuation Act* (Bill C-86)<sup>4</sup> on October 16, 1987 signalled a new twist in the state's use of law as a means to subordinate the working class; however, an examination of the response to this legislation by the Canadian Union of Postal Workers

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\* WRIGHT, M.D., Cavalluzzo, Hayes and Lennon, Toronto.

(CUPW) and the Canadian trade union movement as a whole allows for some commentary as to how labour has helped to foster the present environment.

This paper will situate the events surrounding the passing of the *Postal Services Continuation Act* in a social, political, and historical context. This will be done by exploring the theoretical approaches underlying Canadian public sector labour relations and, in particular, examining the position of the post office within this scheme. In addition, the significance of the back-to-work legislation will be discussed and the problems it presents for labour will be analysed. Finally, this paper will try to draw some conclusions about the role of law in public sector labour relations given the recent experiences at the post office.

### CONCEPTUALISING LABOUR RELATIONS IN THE PUBLIC SECTOR

The conventional wisdom in public sector labour relations, which seeks to ensure that the liberal democratic values underlying the Canadian labour relations system are preserved, affirmed its belief in free collective bargaining in *The Report of the Task Force on Labour Relations*, headed by H.D. Woods<sup>5</sup>. Working from this position of faith, the concept of government as employer has never been seriously questioned: it is recognised that any problems «largely stem from the difficult technical tasks of designing and administering fair and workable labo[u]r relations policies in the public sector»<sup>6</sup>. Moreover, it is generally conceded among conventional industrial relations systems analysts that the role of collective bargaining should be to facilitate consensual, bilateral agreements. In other words, public sector bargaining should become more like that in the private sector, that is to say, more «normalised».

At the base of the conventional labour relations position is the view that conflict can and must be regulated. The assumption is that both parties share an interest in maintaining stability and a sense of equilibrium. Since conflict occurs in a political environment that is mutually acceptable, the argument goes, it is the institutions that are to be the focus of reform so that consensus can be properly reached. Intervention by third parties is to be minimised: the role of government is primarily to establish a framework within which management and labour can relate.

Recent events, however, would seem to suggest that the conventional wisdom has been proven wrong. Since the mid-1960s there has been a steep increase in state intervention in labour disputes for the purpose of legislating strikers back to work<sup>7</sup>. Unlike an institutionalised, all-

encompassing framework which both establishes and restricts the rights of unions, this form of coercion is characterised by its selective and discretionary nature. This allows the state to maximise uncertainty on the part of labour in order to ensure quicker settlements to labour disputes<sup>8</sup>. However, the high incidence of such action led Panitch and Swartz to conclude that when «it becomes common to resort to rhetoric and emergency powers to override the general framework of freedoms, there is clearly a crisis in the old form of rule»<sup>9</sup>.

The use of back-to-work legislation has been primarily directed towards public sector workers, and has proved quite successful over the past decade-and-a-half<sup>10</sup>. The fact that the state is able to effectively implement such measures, however, should not overshadow the effort that is put forward. The energy that is required demonstrates how conscious the state is of the need to use labour relations as a restraining mechanism. This type of coercive activity by government, directed against its own workers, necessitates a reconsideration of the role of the state as conceptualised according to the conventional wisdom. However, unlike an analysis of state intervention in the private sector, the functionalist approach that views the state as a mere instrument of capital is less appropriate in the public sector<sup>11</sup>. An examination of the experiences at the post office, therefore, requires an understanding of the state's own interest in labour relations in the public sector.

Though Panitch and Swartz argue that the state's frequent derogation from the legal framework regulating Canadian labour relations illustrates a crisis in the traditional rule of law, it should be remembered that the rule does represent a constraint on capital which capital would certainly not undertake on its own. Miliband argues that the state is concerned with the defence of the given social order rather than simply with the defence of capital. His point is essentially that the state has its own interests, and though these may be of direct and specific help to capitalist employers, «what the state does is done largely independently of any pressure external to it, out of a dynamic generated in the state itself»<sup>12</sup>. Yet the state itself, though it is a site of class struggle, constitutes a set of social relations which are characterised by inequality: they are relations of dominance and subordination.

In defence of this social order, the state may choose to exert pressure on its own workers as a form of symbolism: Miliband observes that the state «plays a great and growing role in the manipulating of opinion and in the 'engineering of consent'»<sup>13</sup>. In fact, Fudge argues that the recent government example has «emboldened» private sector employers to demand wage freezes or rollbacks and to strive for more control of the workplace in the name of efficiency<sup>14</sup>. Moreover, because the wages of public sector workers

come out of tax monies, any changes are immediately considered political phenomena<sup>15</sup>. Thus the public sector can be seen as a locus of change, for better or worse, for labour.

Unlike the conventional theory that labour relations is simply a system among other systems, each of which is distinct and recognisable<sup>16</sup>, the theoretical perspective adopted in this paper is that labour relations is a necessary and integral aspect of state policy. As such, it responds to shifts and changes in the economic and political climate of society. Moreover, the rule of law is important as it has allowed the state to fashion an acceptable means of repression. As Glasbeek observes:

the first part of any description of an ongoing labour dispute is a statement as to whether or not the union is as yet in a *legal* strike position, or whether or not an ongoing strike is itself *legal* or whether or not unfair labour practices (that is, illegal practices) are engaged in by any of the parties<sup>17</sup>.

Law, then, is used by both management and labour to either justify or condemn action. However, the use of legal discourse means that workers are forced to argue as 'units' rather than in class terms. This means that workers can be categorised as sectoral economic interests and are seen as acting on their own behalf rather than as part of a widespread struggle. The employer, on the other hand, always has the benefit of collective capital and of a capital strike. As I will argue, even though both sides rely on the law, the legalisation of labour relations simultaneously obfuscates and promotes capitalist relations of production<sup>18</sup>.

## THE CONTEXT OF THE DISPUTE

Harvie Andre, the federal minister responsible for Canada Post as a Crown corporation, remarked in the middle of the Canadian Union of Postal Workers' strike that «there's something wrong with the way the [bargaining] system's operating in this circumstance»<sup>19</sup>. The strike certainly was not the problem: it had carefully followed the requirements as set out in the *Canada Labour Code*<sup>20</sup>. Rather, the problem was the inflexibility of Canada Post in negotiations<sup>21</sup>. The reasons beyond this relationship illuminate the state's use of labour relations policy as a means of achieving political and economic goals.

In 1985 the federal government appointed members of the private sector to study the post office and make recommendations as to how efficiency could be increased and costs reduced. An important consideration of what became the Marchment Committee was the level of salaries paid to postal workers and the number of jobs they held down. That this committee was

ever struck represented a departure from the traditional view of the mail system as a public service and a new interest in the post office as serving an economic function. In this respect, the Canadian approach mirrors the recent experience in both the United States and Great Britain<sup>22</sup>. The Marchment Committee concluded that services should be decreased, jobs eliminated, and self-sufficiency should be reached by 1990. If this was not achieved then the government should consider privatisation. This date was later changed to April 1988 by Finance Minister Michael Wilson as part of the federal government's comprehensive economic plan. Given these constraints imposed by the government, it is hardly surprising that Canada Post placed heavy demands on the union, and at the same time was unwilling to accede to the union's requests<sup>23</sup>.

The bargaining position of the Crown corporation was motivated by more than simply its own economic concerns. On September 23, 1987, it was reported that Canada Post was expected to make a small profit in 1988 for the first time since it became a Crown corporation in 1981<sup>24</sup>. It was also reported that well in advance of the date on which the postal workers would be in a position to strike (September 30, 1987), Canada Post had been preparing replacement workers. At the same time, it was running an advertising campaign to support its bargaining position estimated to cost more than \$1 million<sup>25</sup>.

Canada Post and CUPW were unable to reach agreement, and, seven days after conciliation commissioner Claude Foisy's report was submitted on September 23, 1987, the union was in a legal strike position. On September 30th they began a series of rotating walk-outs around the country (with the exception of the Montréal local, which stayed out during the duration of the legal strike period). The union's goal was to minimise mail disruption and picket line violence while maximising the economic hardship on Canada Post by its unpredictability<sup>26</sup>. This strategy was in an effort to avoid back-to-work legislation, a tactic which had been successful for the Letter Carriers' Union during its dispute with Canada Post earlier in 1987. Though a post office spokesperson stated on October 1, 1987 that the strike «hasn't had any noticeable effect»<sup>27</sup>, two days later federal Labour Minister Pierre Cadieux declared that the government «will not tolerate a disruptive, protracted work stoppage at the post office»<sup>28</sup>.

On October 8, 1987, the government introduced back-to-work legislation into the House of Commons, while at the same time Canada Post assured the country that the mail was «moving well»<sup>29</sup>. Eight days later the legislation received Royal Assent and was enacted.

## THE SIGNIFICANCE OF THE POSTAL SERVICES CONTINUATION ACT

Given the context in which the Canada Post-CUPW dispute occurred, it is not surprising (and it was possibly inevitable), that the postal workers were legislated back to work. What is unusual is the mode of enforcement provided for in the Act. Unlike the back-to-work legislation imposed during the 1978 postal workers strike<sup>30</sup>, this legislation does not include criminal penalties for individuals. Instead, the Act provides for the removal and subsequent exclusion of union leaders from office for a period of five years if they fail to order their members back to work. The legislation also contains heavy financial penalties for failure to comply. The significance of these provisions cannot be understated: the Act represents an infringement on the internal affairs of a democratically elected body that had exercised its right to strike in a completely legal manner. For this reason, the legislation demands careful examination and analysis.

### Resumption of Postal Operations

Section 3 of the Act ensures that the employer and every employee «shall forthwith continue or resume» their respective duties so that postal operations are able to proceed. In section 4(1) the union and its officers are required to (a) give notice of the resumption, (b) «take all reasonable steps to ensure that employees comply» with section 3, and (c) «refrain from any conduct that may encourage employees not to comply». In section 4(2) the employer is prohibited from impeding compliance with section 3 and from discharging or disciplining employees for their participation in the strike. The Act also extends the term of the old collective agreement and provides for mediation-arbitration<sup>31</sup>.

As was the case during the 1978 postal workers strike, the government decided to compel the union to do its «dirty work». Glasbeek and Mandel noted about the 1978 experience that the government understood that «it would be more useful if the workers' leaders would tell the workers to return to work, to explain to workers that their much cherished right to withhold their labour ought not, this time, to be insisted on»<sup>32</sup>. Unfortunately for the government, in 1978 Jean-Claude Parrot and the postal workers union refused to obey the law. Though Parrot was eventually convicted of the offence of violating a federal statute<sup>33</sup> and was sentenced to three months in jail plus eighteen months probation, the government failed to achieve its objective of compliance as the back-to-work legislation was ignored for seven days. In 1987, secure in the knowledge that the right to strike is not judicially recognised<sup>34</sup>, the government decided to ensure that this time the union would return to work.

## **Enforcement**

The enforcement section of the Act (ss. 10-12) presents a new twist in back-to-work legislation. Under section 10(1), an individual who violates any provision of the Act:

is liable, for each day or part of a day during which the offence continues, to a fine

- (a) of not less than \$10,000 or more than \$50,000, where the individual was acting in the capacity of an officer or representative of the employer or the union when the offence was committed; or

- (b) of not less than \$500 or more than \$1000 in any other case.

If the employer or the union contravenes any section in the Act, then under section 10(2) «it is liable, for each day or part of a day during which the offence continues, to a fine of not less than \$20,000 or more than \$100,000» (the minimum amounts prevent discharges from being issued in criminal court).

Section 11(1) provides an additional punishment against the union for non-compliance:

No individual who is convicted of an offence under this Act what was committed while the individual was acting in the capacity of an officer or representative of the union shall be employed in any capacity by, or act as an officer or representative of, the union at any time in the five years immediately after the date of the conviction.

Section 11(2) contains a similar provision for individuals acting for the employer. The difference between the two sections, however, is that while a union officer loses his or her job, the Canada Post official can simply be relocated in another area of government work<sup>35</sup>.

Finally, the Act includes a presumption that is new in back-to-work legislation. Section 12 provides that for enforcement purposes, «the union is deemed to be a person». The significance of this treatment will be discussed further below, for now its originality is simply noted.

Though the whole of the Act has been described as «an act of violence against 23,000 postal workers»<sup>36</sup>, there are two separate lines of attack. The legislation holds both individuals and the union responsible for any and all violations. In analysing the provisions, the two forms of punishment raise different issues.

## **Offence by Individuals**

The prohibition order contained in section 11 of the Act represents a substantial new infringement on the internal affairs of the trade union.



While imprisonment has been used against union leaders in Canada in the past, the Act allows the state to surgically remove the individuals they see as problematic, which ensures greater control.

The International Labour Organisation's (ILO) Freedom of Association Committee has pointed out that «the removal from office by the government of trade union leaders is a serious infringement of the free exercise of trade union rights», and it is desirable to refrain «from any governmental interference in the performance by trade union leaders of trade union functions to which they have been freely elected by the members of the trade unions»<sup>37</sup>. However, the Freedom of Association Committee has only found it necessary that:

Legislation should contain provisions which lay down sufficiently precise criteria to enable the judicial authority to determine whether a trade union officer has been guilty of such acts as would justify his suspension or dismissal from office<sup>38</sup>.

It would seem that the provisions of the *Postal Services Continuation Act* have been drafted with enough precision to pass this test. Moreover, not only has the ILO found that in many countries administrative authorities are permitted to dismiss or suspend trade union leaders, but these officials can also be denied appeals to the judiciary<sup>39</sup>. Though the prohibition represents a departure from Canadian labour law, it is not inconsistent with international practice.

### **Offence by the Union**

The government is able to impose sanctions against the union due to the fact that in section 12 of the Act «the union is deemed to be a person». Trade unions have been recognised in federal and provincial statutes as legal entities for the purpose of collective bargaining<sup>40</sup>. The legal personality of unions, however, has yet to be resolved for the purposes of criminal law.

Historically, criminal law was used to constrain the collective actions of unions<sup>41</sup>. Gradually these measures became less available to the state as trade unions became recognised as legal entities and were able to use concerted action. The state, however, used this development to argue that unions should be liable for actions in tort, including breach of contract, civil conspiracy, and the tort of intimidation. Though there remains some uncertainty about the involvement of trade unions in causes of action arising outside the scope of collective bargaining, the Supreme Court of Canada has held that a union has legal status for the purpose of civil actions<sup>42</sup>. The trend, moreover, appears to be to extend liability<sup>43</sup>. Conceptually the criminal liability of the union under the *Postal Services Continuation Act*

represents a return to a nineteenth century style of labour relations, however, the fact that its status is so clearly specified in the statute means that it is not inconsistent with the developing common law.

### THE RESPONSE OF THE UNION AND LABOUR

The postal workers union decided against defying the back-to-work legislation, feeling that the union would be ruined if it fell into the trap being laid<sup>44</sup>. The union could have stayed out on strike and forced the government's hand, that is to say, it could have put the state in the position of forcibly removing union leaders from their offices and from picket lines. This would have been a risky strategy as it would have depended on a public outcry or the threat of one to be successful. In addition to the personal hardship suffered by individuals, the union would stand the chance of being completely destroyed. Suspended officials would be unable to continue conducting the union's business, as Parrot did from his cell in 1979.

However, instead of acknowledging their compliance, the union decided to launch a constitutional challenge to the legislation. The result is an action in the Québec Superior Court in which it will be argued that the Act violates sections 2(c) (freedom of expression), 2(d) (freedom of association), 7 (the right to liberty and to fundamental justice), 11(h) (freedom from multiple punishments), 12 (the right not to be subjected to unusual treatment), and 15 (equality before the law) of the *Canadian Charter of Rights and Freedoms*<sup>45</sup> and section 92(13) (rules of distribution of powers) of the *Constitution Act*<sup>46</sup>.

The government cannot lose. Even if several years from now the legislation is found by the Supreme Court of Canada (where the case will likely end up) to be unconstitutional, the government has already secured its objective, which was compliance with the Act and an end to the strike<sup>47</sup>. The union views the legal action as a possibly important precedent in labour's fight against back-to-work legislation<sup>48</sup>. However, as stated earlier, the judiciary has already spoken to this issue in the three right to strike cases<sup>49</sup>. From the government's point of view, a judicial pronouncement in this case would at worst show them where to tighten up their legislation for next time, or, in the event that they feel too constrained by a decision, Parliament could invoke section 33 of the Charter (the «notwithstanding» clause) to override the judiciary.

If this is the case, then why did the union decide on a court challenge, and more specifically, an action under the Charter? One explanation is that by taking this tact, the union leadership still appears to its members and to

the labour movement as a whole to be opposing the law, while it does not risk its own destruction. Another factor is that the Charter is an alluring substitute for the slow, often painful, political struggle for workers' rights: it presents the possibility of a quick victory in a socially acceptable forum. The use of the Charter by labour, however, has proved to be largely unsuccessful and will continue to be so for several reasons<sup>50</sup>.

By relying on the Charter to protest a law passed by Parliament, the union is forced to argue in a manner that is anti-democratic, anti-majoritarian, and has the effect of legalising political discourse. This denies the union its role as an actor for political change by forcing it to conform to legal standards, making it unable to address class issues or to discuss the importance of the history of trade unionism<sup>51</sup>. Moreover, the Charter is oriented towards individual rights rather than collective rights and as such deliberately excludes trade unions and other like groups from its protection<sup>52</sup>. As Fudge notes, it is necessary to rest a theory of Charter application not on «what the Charter might be if properly read, but rather upon a reading of what it *allows judges to do*»<sup>53</sup>.

Unlike 1978, when Parrot was harshly criticised by then Canadian Labour Congress president Dennis McDermott for his defiance of the back-to-work legislation, the labour movement has supported the legalistic approach taken by the postal workers union in this instance. But by resorting to the Charter as a means to continue the struggle, unions abandon their militancy and lose their ability to effect social change. Though he emphasises institutional rather than political change, Arthurs has also stated that «outlawing strikes will not automatically prevent them from happening; the underlying cause of discontent must be eradicated»<sup>54</sup>. If the union had simply complied with the back-to-work legislation, rather than trying to salvage a legal victory, then workers' anger at having rights they had struggled for denied would not be placated and the chances for real political change would be greater.

## CONCLUSION

This analysis of the *Postal Services Continuation Act* illustrates some of the difficulties inherent in conventional labour relations theory. Particularly problematic in conventional theory is the characterisation of the state as simply a facilitator for consensual, bilateral agreements. By adopting a different view of the advanced capitalist state, I have endeavoured to show that the Canadian state brings to negotiations with its workers an

electoral and also what can be referred to as both a specific and symbolic economic interest. In the case of labour relations at the post office, these interests coincide.

The state regards privatisation of the post office as economically and politically advantageous as it hopes to show the public that it is the government in power that is helping Canadians make themselves more efficient and thus more competitive in the marketplace of international business. In addition, the state has an interest in privatising its services as increased claims upon the state by the disenfranchised have been perceived as antithetical to the needs of the state in terms of economic development<sup>55</sup>. Instead of playing its historical role and assuming the costs of the unprofitable economic sectors, the state now expects capital to take a greater part in financing and administering these areas. Privatisation is seen as the way to change the evaluation of the public sector from social to profit criteria.

Canada Post is aided in its endeavours because of its position in the public sector. Unlike private sector businesses, Canada Post does not have the same market constraints (any losses will simply promote the move to privatisation) and can more readily rely on the threat of state intervention. Apparently, the state will adhere to the concept of voluntarism in the public sector only when it is in its own interest to do so.

It is with greater frequency in the last two decades that the state has had this interest in intervening in labour disputes. The state's use of law to achieve its goal in the post office dispute is important on a symbolic level (as the post office is the first attempt at privatisation), but also in a particular sense as it enables the government to achieve its own political and economic goals<sup>56</sup>. The prohibition order and heavy fines contained in the *Postal Services Continuation Act*, moreover, represent a rejection by the state of institutional reform as a means of expressing its dissatisfaction with the *status quo* in favour of a more direct attack through law.

However, by countering legalised repression with a court action, the union has helped to remove labour relations and its own struggle from the political arena to the courtroom. It is naive to turn to the judiciary for help in light of how our courts have historically responded to trade unions. It was not long ago that unions were thought to be criminal conspiracies<sup>57</sup>. This strategy also serves to remove the power from workers, and turns it over to lawyers. Legalisation obscures the actual pressures and interests that determine state behaviour by removing notions of social power and instead focussing argument on abstract rights. The Charter, in particular, channels real grievances into a forum where they are attenuated in legal debates, with the *status quo* left untouched or even reinforced<sup>58</sup>.

In the conclusion to their 1984 article, Glasbeek and Mandel write that «we should be doing our fighting on the basis of class. Collaboration in the legalisation of politics will prevent us from doing this»<sup>59</sup>. The increasing tendency of unions to manage discontent rather than promote workers' interests manifests itself in reliance on the legal system. This is dangerous, for law is the backdrop of the power relation between capital and labour, and though it is the exception to use it in the coercive manner that has been examined, it is always present as a symbolic effect. It is necessary, therefore, to refocus attention on the political process in order to insist that democracy be respected at work.

## NOTES

1 L. PANITCH and D. SWARTZ, *The Assault on Trade Union Freedoms*, Toronto, Garamond Press, 1988, p. 63.

2 H.J. GLASBEEK, «Labour Relations Policy and Law as Mechanisms of Adjustment», *Osgood Hall Law Journal*, Vol. 25, 1987, p. 199.

3 *Ibid.*, p. 209.

4 S.C., 1987.

5 H.D. WOODS et al., *Industrial Relations: The Report of the Task Force on Labour Relations*, Ottawa, Privy Council Office, 1968. In particular, note Harry ARTHURS' observation that «[s]o long as collective bargaining remains central to our general labour policy, it seems clear that *voluntarism* should likewise remain a primary value in essential industry disputes» (emphasis in original). See his *Labour Disputes in Essential Services* (Task Force on Labour Relations, Study No. 8), Ottawa, Privy Council Office, 1968, p. 239. At 235 of his study, Arthurs also quotes from E.A. JONES, «Compulsion and the Consensual in Labor Arbitration», *Virginia L. R.*, Vol. 51, 1965, p. 369: «Our Bias Should Properly Remain with the Consensual».

6 H.W. ARTHURS, *Collective Bargaining by Public Employees in Canada: Five Models*, Ann Arbor, Institute of Labor and Industrial Relations, 1971, p. 14.

7 PANITCH and SWARTZ, *supra* note 1, Table III, p. 31. Note also their comments at p. 30: «In the first fifteen years after 1950, there were only six instances of back-to-work legislation in total; there were *fifty-one* such instances in the following decade-and-a-half, with half of these from 1975-79 alone. Yet another forty-three such measures were to follow in the 1980-87 period» (emphasis in original).

8 In this regard, it is interesting to note that in *Labour Disputes in Essential Services*, *supra* note 5, Arthurs argues that because ad-hoc legislation renders labour uncertain and can be tailored precisely, it leads to quicker settlements and thus the state interferes *less* with direct labour-management negotiations. He therefore views ad-hoc intervention as a positive mechanism. This approach, of course, is based on the assumption that conflict must be regulated despite the hardship it may cause one or both of the parties.

9 *Supra* note 1, p. 31.

<sup>10</sup> The explanation for this focus by the state is discussed in conclusion of this paper, see the text accompanying notes 55-56, *infra*. In addition to this theoretical discussion, some of the misconceptions underlying the «malining» of public sector employees is detailed in an excerpt from a brief by the CANADIAN UNION OF PUBLIC EMPLOYEES, «Scapegoating the Public Sector» in Daniel DRACHE and Duncan CAMERON (eds.), *The Other MacDonald Report*, Toronto, Lorimer, 1985, pp. 42-48.

To further illustrate my point, consider what in recent times was perhaps the most graphic illustration of state intervention, the *Public Sector Compensation Restraint Act* (the federal government's «6 and 5» program). Introduced in June 1982, the 6 and 5 program suspended collective bargaining in the public sector and left any wage increases to the discretion of Parliament. As was the case with the *Anti-Inflation Act* of 1975-78, the legislation abandoned the previously espoused notion of privately conducted labour relations. As it had in the previous decade in *Reference Re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452, the Supreme Court of Canada legitimated the state's actions: see *Public Service Alliance of Canada v. The Queen* (1987), 87 C.L.L.C. 14,022 (SCC). At 12,196 of his minority judgement (the majority, having found no violation of freedom of association, did not have to consider the question), C.J. Dickson justified this departure because the «leadership role of government» necessitated a legislative focus on the public sector. This reason was put forward despite the absence of any evidence that public sector wages were responsible for inflation.

<sup>11</sup> This is particularly true in light of some evidence of past commitment by the state to a full employment policy. To this end, state workers grew by 365 per cent between 1946 and 1974, and increased their share of the Canadian labour force from 8,9 percent in 1946 to 21,2 per cent in 1974. Hugh Armstrong argues that this increase is part of the state's guarantee to labour as part of the post-World War II Keynesian compromise. See H. ARMSTRONG, «The Labour Force and State Workers in Canada» in L. PANITCH (ed.), *The Canadian State: Political Economy and Political Power*, Toronto, University of Toronto Press, 1977, pp. 295-96.

<sup>12</sup> R. MILIBAND, «State Power and Capitalist Democracy» in S. RESNICK and R. WOLFF, *Rethinking Marxism*, Brooklyn, N.Y., Antomedia Inc., 1985, p. 265.

<sup>13</sup> R. MILIBAND, «State Power and Class Interests», *New Left Review*, vol. 138, 1983, p. 60. Miliband has also pointed out that «the state, as the largest of all employers, is now able to influence the pattern of 'industrial relations' by the force of its own example and behaviour: that influence can hardly be said to have created new standards in the employer-employee relationship. Nor could it have been expected to do so, given the 'business-like' spirit in which the public sector is managed». See his *The State in Capitalist Society*, London, Quartet Books, 1969, p. 74. Note also Arthurs' observation that a «characteristic of essential industries is that their labour relations experiences may serve as a model, good or bad, for the rest of the economy»: *supra* note 5, p. 5.

<sup>14</sup> J. FUDGE, «Labour, The New Constitution, and Old Style Liberalism», *Queen's L. J.*, vol. 13, 1988, p. 62. See also the discussion of the symbolic intent behind the 6 and 5 legislation in GLASBEEK, *supra* note 2, p. 225.

<sup>15</sup> The importance of taxation policy in this respect has, unfortunately, been largely overlooked by those who will suffer the most under the Conservative government's federal tax reform. By setting limits on the fiscal capacity of the state, taxation takes priority over many other aspects of policy. See generally, J.E. CRONIN and T.G. RADTKE, «The Old and New Politics of Taxation: Thatcher and Reagan in Historical Perspective» in R. MILIBAND, L. PANITCH and J. SAVILLE (eds.), *The Socialist Register 1987 — Conservatism in Britain and America: Rhetoric and Reality*, London, The Merlin Press, 1987, pp. 263-96; M. SALTSMAN, «Reflections on Tax Reform in Canada», 1 *Canadian Taxation* 30, Winter 1979; and R. WHITAKER, «Neo-Conservatism and the State», in *The Socialist Register 1987*, p. 19.

16 J.C. ANDERSON and M. GUNDERSON, *Union-Management Relations in Canada*, Don Mills, Addison-Wesley, 1982, pp. 2-8.

17 GLASBEEK, *supra* note 2, p. 208 (emphasis in original).

18 See generally, R. WEITZER, «Law and Legal Ideology: Contributions to the Genesis and Reproduction of Capitalism», *Berkeley J. of Sociology*, vol. 24, 1980, p. 137.

19 *The [Toronto] Globe and Mail*, 9 October 1987, p. 16.

20 R.S.C. 1970, c. L-1.

21 See note 23, *infra*. This intransigence has its roots in the military «command and control» style of management started after World War II. An authority on organisational behaviour says today's management still carries on in that fashion. See W. STEFANIUK, «Post office blues: Why bosses, labor can't stay in tune», *The Toronto Star*, 17 May 1988, p. 18. The worker dissatisfaction that arose from the early experience then set the stage for the CUPW-Canada Post disputes of the 1960s and 1970s, see J.W. RINEHART, *The Tyranny of Work: Alienation and the Labour Process* (2nd ed), Toronto, Harcourt Brace, 1987, pp. 113-14.

22 For a commentary on management problems in the United States Postal Service, see A.L. SORKIN, *The Economics of the Postal System*, Lexington, Mass., Lexington Books, 1980, pp. 182-84. For a discussion of the dilemma faced by postal unions in Great Britain in fighting the trend towards commercialism in state monopolies, see E. BATSTONE, A. FERNER, and M. TERRY, *Consent and Efficiency: Labour Relations and Management Strategy in the State Enterprise*, Oxford, Basil Blackwell, 1984, pp. 275-79.

The current trend in Canada towards privatisation is a departure from the traditional importance attached to the post office as a public institution. As R.D. Vanderberg notes: «Historically, it has been viewed as being so important that it should be run by the government and not by private enterprise. This view is based on two assumptions. Firstly, that because of its importance, the mail service should be run by that one element in our society which is most directly accountable to public desires and opinion, the government. Secondly, that the importance of the postal service is such that it should be free of the constraints of profit maximization which dominates the activities of the private sector.» See *The Post Office and its Workers: An Appraisal of Attitudes that are Destroying a Vital Public Service*, Ottawa, 1971, pp. 6-7.

23 On 24 September 1987 (the day after the conciliation report was released), Canadian Union of Postal Workers president Jean-Claude Parrot agreed that new postal outlets could be privatised, but old ones would remain the way they were. This represented a major concession on the part of CUPW, but it was rejected by Canada Post's negotiators: *The [Toronto] Globe and Mail*, 25 September 1987, p. 1.

24 *The [Toronto] Globe and Mail*, 23 September 1987, p. 14.

25 *The [Toronto] Globe and Mail*, 29 September 1987, p. 2. Canada Post's advertising campaign, however, did not stop them from subsequently trying to take the letter carriers' and mail sorters' unions to court over anti-government ads that were sponsored by «your Canada Post employees» (a settlement was negotiated before the case went to court in which the unions agreed to clarify that they were the sponsors of the ads): *The [Toronto] Globe and Mail*, 15 April 1988, p. 9.

26 Note that this tactic was only possible because of the choice by Canada Post to use replacement workers (one of the few federal agencies ever to employ strikebreakers). It was the cost of having to keep replacement workers ready all over the country in case the union chose to walk out in a given area that was to cause the economic hardship.

27 *The [Toronto] Globe and Mail*, 1 October 1987, p. 1.

28 *The [Toronto] Globe and Mail*, 3 October 1987, p. 1.

29 Writing in *The [Toronto] Globe and Mail*, columnist Lorne Slotnick observed that «the strikes were so low-key and violence-free that they were barely noticeable, and probably

not very effective in hurting management economically... Canada Post and the Government could have a difficult time convincing the public that they operate at arm's length». See his «CUPW unlikely to win franchise battle», 10 October 1987, p. 12.

30 *The Postal Services Continuation Act, 1978-79.*

31 Perhaps in response to the objections that were raised over the *Maintenance of Ports Operations Act* of November 1986, the legislation attempts to be even-handed by providing corresponding obligations and penalties for non-compliance on Canada Post. However, the fact that this is simply window-dressing can be seen in section 7(2) (c), which requires the mediator-arbitrator, if unable to mediate an agreement, to hear the employer and the union on the matter and «give cognizance» to the report of the conciliation commissioner in rendering a decision. Foisy's report had stated that the decision to privatise was a managerial prerogative.

32 H.J. GLASBEEK and M. MANDEL, «The Crime and Punishment of Jean-Claude Parrot», *The Canadian Forum*, vol. 59, August 1979, p. 11. See also *R. v. Parrot* (1979), 27 O.R. (2d) 333 (C.A.). Leave to appeal to S.C.C. refused 1980, 27 O.R. (2d) 333n.

33 Formerly section 115 of the *Criminal Code*, now section 126 of the *Code*, R.S.C., c. C-34.

34 See the trilogy of cases decided in 1987: *Reference Re Public Services Employee Relations Act*, 87 C.L.L.C. 14,021 (SCC); *P.S.A.C. v. R.*, *supra* note 10; and *RWDSU v. Government of Saskatchewan*, 87 C.L.L.C. 14, 023 (SCC).

35 This critique of the provisions is set out in purely economic terms, and ignores the motivations which may initially prompt an individual to become involved in union leadership. The depth of commitment among many trade unionists has been captured by Lane Kirkland, who has observed that «[u]nion office is a calling, not a business». See his remarks as quoted in J.E. SANCHEZ, «The Exclusion of Criminals from Union Posts», *Western State University L.R.*, vol. 12, 1985, p. 698.

36 Jean-Claude Parrot as quoted in *The [Toronto] Globe and Mail*, 17 October 1987, p. 1.

37 B. GERNIGON, *Tenure of Trade Union Office*, Geneva, International Labour Office, 1977, pp. 71-72.

38 *Freedom of Association*, 3rd edition, Geneva, International Labour Office, 1985, p. 91 (see Case No. 654, para. 78).

39 GERNIGON, *supra* note 37, pp. 70-72.

40 In considering the position of the Canadian Union of Postal Workers, see *The Canada Labour Code*, R.S.C. 1970, c. L-1, section 9.

41 This was the position at common law. In 1872, an equivalent of the 1871 English *Trade Unions Act* was passed (1872, 35 Can., c. 30). This was an attempt to protect unions against criminal prosecution, but it proved inadequate.

42 *International Longshoremen's Association Local 273 v. Maritime Employers' Association* (1978), 89 D.L.R. (3d) 289.

43 In *Nisho (Canada) Ltd. v. International Longshoremen and Warehousemen's Union* (1965), 54 D.L.R. (2d) 758 (BSSC) at 760, it was held that though it is not a corporation, a union is a «*persona juridica* and liable to prosecution» for a criminal contempt of court charge. In *Gibson v. National Association of Broadcast Engineers and Technicians* (1983), 42 Nfld. & P.E.I. R. 346 (Nfld. S.C.) the union was held liable whether or not the action arose from union business.

44 *The [Toronto] Globe and Mail*, 17 October 1987, p. 1.

45 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982* (U.K., 1982, c.11). [Hereinafter cited as the Charter.].

46 Statement of Claim, *Superior Court*, Province of Québec, District of Montréal, 3 November 1987 (translation).



Even if the court found that one or more of these sections had been violated, the legislation could still be justified under section 1 of the Charter if the limit was found to be «demonstrably justified in a free and democratic society». Given the statements made by the federal government about their unwillingness to tolerate a prolonged dispute, while at the same time insisting that the mail was being processed (see *supra* notes 27-29), it would be difficult to argue that the legislation was in response to a «national emergency», or even a «pressing and substantial social concern» (C.J. Dickson in the *P.S.A.C.* case, *supra* note 10, pp. 12, 195). Note that in *RWDSU v. Government of Saskatchewan*, *supra* note 34, J. Wilson disagreed with the Supreme Court of Canada's inclusion of economic harm as a consideration under section 1 of the Charter. However, she remains a minority on the Court. Moreover, as Sidney Peck has suggested, even after the Supreme Court of Canada's decision in the case of *R. v. Oakes*, [1986] 1 S.C.R. 103, the standard of justification under section 1 remains largely indeterminate and judges retain unfettered discretion. See his «An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms», *Osgoode Hall L. J.*, vol. 25, 1987, p. 67.

In addition, an examination of other «free and democratic societies» would not support the union's case. In the United States, for example, ad hoc back-to-work legislation is uncommon, but strikers are more often fired or the military is brought in to end the strike. See B.D. MELTZER and L.R. SUNSTEIN, «Public Employee Strikes, Executive Discretion and Air Traffic Controllers», *University of Chicago L.R.*, vol. 50, 1983, p. 731. The more general international experience would also not be of much help to the union's case (see text accompanying notes 38 and 39, *supra*).

47 Michael Mandel goes further, arguing that the Charter may also have played a role in the «brutal» nature of the legislation. His argument is that the government anticipated the use of the Charter by the union, which lessened the chances of it having to act on the penalties in the back-to-work legislation. This for Mandel raises the question of whether the Charter «can legitimate more repression than would otherwise be possible». See his *The Charter of Rights and the Legalization of Politics in Canada*, Toronto, Walt & Thompson, 1989, p. 203.

48 Jean-Claude Parrot during his address at Osgoode Hall Law School, Toronto, Ontario, 18 November 1987.

49 See *supra* note 34.

50 For a discussion of the impact of the Charter on labour law, see FUDGE, *supra* note 14.

51 H.J. GLASBEEK and M. MANDEL, «The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms», *Socialist Studies*, vol. 2, 1984, p. 84. The authors note at p. 97 that «it is a specific kind of 'reason' that prevails in court, specifically the kind in which numbers or, to be more precise, *classes* do not count. In other words, you cannot say anything you want in court. Argument must take a particular form... only lawyers do the actual debating. But the problem is not that it is lawyers who do the speaking; it is the language they speak.»

52 One feature of Charter litigation that underlines its individualism and is particularly relevant to the CUPQ strategy is pointed out by Mandel, who notes that «you cannot prevent others from going to court on your behalf. The union 'movement' has no power to stop individuals or individual unions from going to court in the name of labour.» See MANDEL, *supra* note 47, p. 189n.

53 FUDGE, *supra* note 14, p. 64 (emphasis in original). See also Mr. Justice B. DICKSON, «The Judiciary — Law Interpreters or Law Makers», *Manitoba L. J.*, vol. 12, 1982-83, p. 1.

54 ARTHURS, *supra* note 5, p. 208.

55 This attempt at reduction is despite the fact that at 20,2 per cent of its gross domestic product, Canada's spending on welfare is the lowest of the Group of Seven countries. These

countries are the United States, Japan, West Germany, France, Great Britain, Italy, and Canada. See *The Toronto Star*, 30 September 1986.

56 For a discussion of how government wage restraint strategy was used in the latter way, see D. WOLFE, «The State and Economic Policy in Canada, 1968-75» in L. PANITCH (ed.), *The Canadian State*, *supra* note 11, 251-88, at p. 281-88.

57 P.J.J. CAVALLUZZO, «Freedom of Association — Its Effect Upon Collective Bargaining and Trade Unions», *Queen's L. J.*, vol. 13, 1988, p. 272. See also the discussion at note 41, *supra*.

58 This is not to say that the legal avenue should be rejected in every instance. Rather, law needs to be understood to know when it is to be used. Though all legal victories are incomplete and contradictory (in part due to subsequent administration of the law), in some cases law can provide an important encroachment on the power of capital.

59 GLASBEEK and MANDEL, *supra* note 51, p. 112.

### ***Les abus de la loi dans les relations du travail à la Société canadienne des postes***

L'accroissement du recours aux lois spéciales de retour au travail exige de revoir la théorie traditionnelle des relations professionnelles. Les conséquences de cette forme de législation signifient que la loi joue un rôle de plus en plus considérable dans le façonnement des relations entre le travail et le capital. Cet article aborde cette question à la lumière de la *Loi sur le maintien des services postaux* de 1987 qui marque une orientation nouvelle et majeure dans l'utilisation de telles lois.

Le gouvernement met l'accent sur les relations professionnelles dans le secteur public à cause de leur grande valeur symbolique, mais aussi parce qu'elles constituent un aspect nécessaire et intégré dans sa politique économique. Cette stratégie agressive exige que l'on reconsidère le rôle de l'État tel que conceptualisé dans la théorie conventionnelle des relations du travail. De plus, lorsque les travailleurs s'opposent à ces changements, on assimile leur attitude à la recherche d'intérêts économiques sectoriels plutôt qu'à un élément d'un mouvement plus large à cause du régime juridique qui modèle ce milieu. La législation en matière de relations professionnelles, par conséquent, cache et révèle à la fois les rapports économiques de facture capitaliste.

Si l'on examine le contexte du différend de 1987 entre Postes-Canada et le Syndicat des postiers du Canada, les motifs allégués pour justifier la loi ordonnant le retour au travail apparaissent plus nettement. Elle contient des modalités d'application qui sont en même temps nouvelles et très répressives pour les syndicats et leurs membres. Cette loi requiert un examen approfondi du fait même de sa portée, car elle exprime un empiètement dans les affaires internes d'une organisation choisie démocratiquement qui a exercé son droit de grève d'une manière tout à fait légale.

La réponse du syndicat à cette loi fut d'abord de s'y conformer, puis ensuite de la contester devant les tribunaux. Ses procureurs projettent de plaider qu'elle viole

plusieurs articles de la *Charte canadienne des droits et libertés* et qu'elle devrait être déclarée inconstitutionnelle. L'article décrit les difficultés de cette démarche en référant au rôle de la législation dans les relations professionnelles. De plus, il tient compte de l'effet nocif que pareille action aura sur les membres du syndicat et sur le mouvement syndical dans son ensemble.

L'inopportunité de démarches juridiques devient claire lorsque l'on considère l'orientation politique du gouvernement et de la situation spécifique des services postaux à l'intérieur de celle-ci. Les syndicats ne doivent pas s'en remettre à la Charte pour combattre les lois spéciales de retour au travail, ceci n'a pour résultat que de faire passer la question des relations du travail des arènes politiques aux cours de justice. Au contraire, il s'impose que le mouvement syndical recentre son attention sur les mécanismes politiques.

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## ***La Législation en matière de normes d'emploi au Canada***

***Édition de 1989***

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